United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 28, 1997

TO : Frank W. Hoeber, Acting Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Topps Company, Inc.
Case 4-CA-25444

530-6050-0825-3300
530-6067-4011-1100
530-6067-4011-4400
530-6033-7056-8400

This case was submitted for advice as to whether the Employer's decision to close a plant and subcontract the plant's production work was a mandatory subject of bargaining and, if so, whether the Employer bargained to impasse before making that decision.[1]

FACTS

The Topps Company (the Employer) sells collectible cards and bubble gum which, until recently, it manufactured at a plant in Duryea, Pennsylvania.[2] The plant had approximately 400 working employees, and approximately 400 additional employees on layoff status. Teamsters Local 229 (the Union) represents the production and maintenance employees. The most recent collective-bargaining agreement expired on December 15, 1996.

At some point in 1996,[3] the Employer began to consider closing the Duryea plant and outsourcing production of the products manufactured there, and sought information from several companies about the possibility of their performing

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[1] This case was also submitted regarding the propriety of Section 10(j) injunctive relief. That issue will be addressed in a separate memorandum.

[2] The Employer also sells candy which it manufactures at a plant in Scranton, Pennsylvania. In addition, the Employer also has several subsidiaries based in New York City: Topps International, Inc., Goudey Gum, Inc., Bowman Gum, Inc. and Topps Comics, Inc.

[3] All dates hereafter are in 1996 unless otherwise noted.

the work. On September 27, a few days before the parties' scheduled initial bargaining session for a new contract, the Employer's Vice-President of Manufacturing, Michael Drewniak, privately informed Union President John Monahan that the Employer was considering closing the plant and subcontracting all of the work. On September 30, the Employer executed an "Option Agreement" with Leaf, Inc. for Leaf to produce the Employer's gum, "depending upon the outcome of the upcoming discussions with the Union."[4]

At the initial negotiating session on October 1 and by letter dated the same day, Drewniak formally informed the Union and the Duryea employees that it was considering closing the plant. The letter stated that, "by continuing operations at the Duryea facility rather than outsourcing all gum and card production requirements [the Company] is spending an extra $9,000,000 annually." No other reason was given for the Employer's contemplated action. On the same date, the Union requested decision bargaining and forwarded several information requests to the Employer. Among other things, the Union asked for a breakdown of the Employer's direct and indirect labor costs and the identity and location of proposed subcontractors.

The next meeting between the parties was held on October 9. The Union sought suggestions as to how the plant could be saved. Drewniak said the Employer had no ideas to offer. When asked how much money the Union would need to offer in concessions, Drewniak stated, We're looking at $9 million or close it. $8 million is close. $5 million is not. The Union canceled several bargaining sessions, which had been scheduled before the Employer announced it was considering closing, in order to formulate a concession proposal.

During the next few days, the parties and their attorneys exchanged several letters. In an October 14 letter, Monahan charged that the Employer had already made its decision to close the plant, and objected to the Employer's request for a full $9 million in concessions when much of the savings from closure was not related to labor costs. On October 15, the Union made a second information request, for all documents, records and cost studies which supported or justified the Employer's decision to subcontract the work. In response to the Union's letters, Drewniak denied that the decision had been made, but said that the company "had given the Union a verifiable analysis that shows we can eliminate spending an extra $9 million by

[4] The agreement provided that the Employer would have until April 1, 1997 to exercise its option to subcontract.

outsourcing and closing the Duryea facility," and that the Employer was unaware of "a viable alternative to this outsourcing scenario." The Employer also provided some of the previously requested information concerning subcontractors.

By letter dated October 23, Union attorney Robert Mariani requested an opportunity to review the Employer's records at the plant with the assistance of an accountant hired by the Union. The Employer agreed to this proposal the next day, and the review occurred on October 28. Among other things, the Union reviewed the Employer's analyses which showed that by subcontracting the work to other companies the Employer could save approximately $9.3 million per year.[5] According to these studies, approximately $5 million would be saved in direct and indirect labor costs, $2.5 million would be saved in management and clerical salaries and benefits, and $1.8 million would be saved in "Operating Expenses" (including about $1 million in utilities and $485,000 in repair and maintenance costs).

The parties held a bargaining session on October 29. The Union presented its initial proposal. Mariani stated that negotiations over a plant closing were not typical contract negotiations, and the Union had eliminated posturing and presented a proposal that was close to the best the Union could offer. He further stated that it was very important to save the plant, and that the proposal was not the Union's final offer. The proposal provided $2.4 million in annual concessions for the first two years of the contract, which constituted approximately half of the Employer's anticipated savings in labor costs through subcontracting. The third year would have a wage and benefit reopener which would include the right to strike. The proposal left for further negotiation "the precise manner in which this proposed labor cost reduction would be allocated among the various wage and benefit components of the Company’s bargaining unit labor and benefit costs."

After reviewing the proposal, Employer attorney Harold Weinrich stated that while $2.4 million was a very impressive figure, 9.3 million is a big number. He further stated that, I assume you have additional play but not to the tune of $7 million. Mariani stated that he did not have that amount today. Weinrich stated that if there was anything else that the Union wanted him to present to the Employer’s decision-makers in New York, now is the time to do it. Mariani responded by handing Weinrich a letter

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[5] The Union has not challenged the legitimacy of that figure.

Drewniak had written to the employees in 1995 regarding losses of $3.5 million per year due to extended work breaks.

The next meeting was held October 31. At the outset, Weinrich stated that the Employer had decided to close the Duryea plant and outsource all production of gum and cards. He stated that the Employer had considered the Union's proposal of $2.4 million in concessions, but that the Employer could save in excess of $9 million by subcontracting, a far larger amount. He stated that the $3.5 million referred to in the work break letter reflected a "worst-case" scenario, and that that problem had already been greatly alleviated. Weinrich then stated that the Employer was prepared to engage in effects bargaining for the Duryea employees and in negotiations for a new contract for the Scranton plant.[6]

In newspaper articles printed during the negotiations, Union representatives were quoted as stating that the Union would not make concessions regarding the amount of the Employer's outsourcing savings that were not attributable to labor costs, and that "there is no way we could come up with $9 million in concessions." The Union asserts, however, that by reducing wages (currently an average of $12 per hour) and fringe benefits by one-third, the Union could annually save the Employer the full $9 million. The Employer asserts that matching the anticipated outsourcing savings would require a reduction in the average wage to approximately $7 per hour, and a surrendering of all fringe benefits such as health insurance, vacations, and pension benefits.[7]

The plant closed on December 13.[8] The Employer has contracted out the Duryea gum production work to Leaf and the Duryea card work to Wrap-It, Avne, and Great Western Press. The Employer shipped its gum production equipment to Leaf in January, and Leaf began producing gum in February. The card production subcontractors have been producing cards

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[6] At an effects bargaining meeting on November 19, Weinrich asked Monahan to speak up if the Union had another proposal regarding the closing decision. Monahan did not respond.

[7] The Employer originally asserted that employees would have had to work at just below minimum wage in order to save the Employer $9 million. However, in recent discussions with the Division of Advice, the Employer's counsel have used the "$7 per hour" figure.

[8] The Employer paid all employees through December 31.

since mid-December. The Employer has sold, or will soon sell, its card production equipment.

ACTION

We conclude that the Employer's decision to close the Duryea facility and subcontract its manufacturing of collectible cards and gum was a mandatory subject of bargaining. We further conclude that the Employer failed to bargain to impasse before implementing that decision.

I. The Employer's Decision to Subcontract its Production Work Was a Mandatory Subject of Bargaining

In Fibreboard Paper Products v. NLRB,[9] the Court held that an employer's subcontracting of its maintenance work in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment constituted a mandatory subject of bargaining. The Court stated that since the decision to subcontract involved no capital investment and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge the company's freedom to manage the business."[10] Moreover, since the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective-bargaining framework ...."[11]

In First National Maintenance,[12] the Supreme Court held that an employer's decision to close down part of its business was not a mandatory subject of bargaining, because it was a decision "akin to the decision whether to be in business at all" and, in that situation, the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision. . ."[13] The court left Fibreboard intact, and

[9] 379 U.S. 203 (1964).

[10] Id. at 213.

[11] Id. at 214.

[12] 452 U.S. 666 (1981).

[13] 452 U.S. at 677, 686.

stated that each case involving economic decisions that impact employees, "such as plant relocations, sales, other kinds of subcontracting, automation, etc." must be considered on its particular facts to determine whether "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[14]

More recently, in its Dubuque Packing[15] decision, the Board enunciated the following test for determining whether a work relocation decision is a mandatory subject of bargaining: The General Counsel has the initial burden of showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation." The Employer then has the burden of rebutting the General Counsel's prima facie case or proving certain affirmative defenses.[16] Where the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," there will be no duty to bargain over the decision.[17] The Employer also may avoid bargaining if it demonstrates that (1) labor costs were not a factor in the decision or (2) even if labor costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.[18]

Although Dubuque Packing specifically concerned work relocation decisions, its principles are applicable to all "Category III" decisions -- decisions that have a direct impact on employment but have as their focus the economic profitability of the employing enterprise[19] -- that fall

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[14] 452 U.S. at 679, 686, n. 22.

[15] Dubuque Packing Co., 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24, 31-33, 143 LRRM 3002 (D.C. Cir. 1993), pet. for cert. dismissed 146 LRRM 2896 (1994). See also "Guideline Memorandum Concerning Dubuque Packing Co., Inc., 303 NLRB No. 66," Memorandum GC 91-9, dated August 9, 1991 at p. 4 (hereinafter GC Guideline).

[16] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-5.

[17] See Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360, 148 LRRM 2705 (4th Cir. 1995), affd. ___U.S. ___, 152 LRRM 2001 (1996).

[18] Dubuque, 303 NLRB at 391; GC Guideline at pp. 4-6.

[19] See First National Maintenance, 452 U.S. at 677.

within the spectrum between Fibreboard and First National Maintenance.[20]

Here, the Employer has not merely subcontracted a portion of its work, at its facility and under its direct control, but has closed its facility and subcontracted its entire manufacturing operation. Thus, the Employer's decision is not precisely within the parameters of Fibreboard. On the other hand, the Employer has not gone out of even a portion of its business, but has subcontracted with other companies to provide it with products, manufactured according to its designs, recipes and specifications, which it will continue to sell to its customers. Thus, the Employer's decision is not the kind of "partial closing" - or going out of part of a business - that was at issue in First National Maintenance.

A. Dubuque prima facie case

Applying the Dubuque test, the Region should argue that the Employer's subcontracting did not significantly change the nature or direction of its business. First, the decision turned on labor costs, which represented $5 million of the $9 million the Employer estimated it would save through outsourcing. Thus, the decision was highly amenable to collective bargaining. In First National Maintenance, the Supreme Court held that Category III decisions that are amenable to collective bargaining should be bargained unless bargaining would place a burden on the conduct of the business that outweighed its benefits. Applying this analysis in Otis Elevator[21] and its progeny, the Board held that Category III decisions that turn on labor costs cannot constitute the kind of change in the scope or direction of a business that should be considered too entrepreneurial to be subject to a bargaining obligation.[22]

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[20] See Westinghouse, 313 NLRB 452 (1993), enfd. 46 F.3d 1126 (4th Cir. 1995) (Dubuque applicable to Category III decisions that are not Fibreboard subcontracting).

[21] 269 NLRB 891 (1984). See also The Reece Corp., 294 NLRB 448, 449-450 (1989); Michigan Ladder Co., 286 NLRB 21, 29 (1987).

[22] With regard to the continuing validity of cases that used this dichotomy in interpreting the "change in scope or direction of the enterprise" prong of Otis, see GC Guideline at p. 5 and Waltrec American Forgings, Case 34-CA-6698, Advice Memorandum dated May 15, 1995. Although the Otis dichotomy appears superficially inconsistent with the Dubuque formula, which considers the relationship of labor

Moreover, the Employer's decision to close the Duryea facility and subcontract the work was not the kind of "partial closing" -- "akin to a decision whether to be in business at all" -- that would constitute a change in the scope or direction of the enterprise under First National Maintenance. The Employer has not gone out of any part of its business of manufacturing and selling cards and gum. Rather, it is having the products manufactured for it, pursuant to its designs and specifications and with some of its equipment, for sale under its name.

In Bob's Big Boy Restaurants,[23] the employer discontinued the shrimp processing part of its food processing operation, sold the processing equipment, and subcontracted to have another company provide processed shrimp to its restaurants. The Board held that that was a mandatory subject of bargaining because the employer had not changed the nature and direction of its business since it was still in the business of providing foods, including processed shrimp, to its restaurants. The employer had not closed a "separate and distinct" business, but had just subcontracted an integral part of its business. The Board distinguished First National Maintenance, Kingwood Mining, 210 NLRB 844 (1974), enfd. 90 LRRM 2844 (D.C. Cir. 1975)(employer closed coal mining operations and expanded independent coal processing operations), and General Motors, 191 NLRB 951 (1971) (employer sold dealership), because

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costs to the decision only after the GC makes out a prima facie case that the decision was not accompanied by a basic change in the employer's operation, arguably the Board's reallocation of the burdens of proof in Dubuque did not change the substantive definitions of long-established terms such as "change in nature of the enterprise." See 303 NLRB at 392. Thus, although the General Counsel no longer is required to show a decision turned on labor costs (rather, the employer must demonstrate labor costs were not a factor assuming the prima facie case has been met), the General Counsel may rely on the fact that a decision turned on labor costs as part of his prima facie showing that a decision did not involve a change in the scope or direction of the enterprise. The Otis dichotomy is consistent with the well-established rationales of Fibreboard and First National Maintenance that issues amenable to collective bargaining should be bargained, and those that are not - because they involve entrepreneurial concerns the union could not address - should not.

[23] 264 NLRB 1369 (1982).

those cases involved the complete termination of a business independent from the rest of the employer's operation.[24]

In Michigan Ladder,[25] the employer stopped manufacturing ping pong tables and ladder parts, and contracted with a subcontractor to manufacture those items at the employer's facility. The employer leased its equipment to the subcontractor and paid for the finished product. Although the product had to be produced to the employer's specifications, the subcontractor had the right, by contract, to direct the method of production. The ALJ, upheld by the Board, rejected the employer's assertion that it was no longer in the business of manufacturing tables and ladder parts and therefore had changed the scope or direction of its business. Rather, since the employer still marketed and distributed tables and ladders it was having manufactured subject to its ultimate control, its decision to subcontract was a mandatory subject of bargaining.

In Textron Lycoming, supra, the Division of Advice concluded that an employer's decision to subcontract the manufacturing of the engine component parts it used in the assembly and servicing of airplane engines was a mandatory subject of bargaining. The employer had laid off 300 employees, approximately one-half the unit, and intended to dispose of machinery and equipment and close a building at one facility. Relying on Fibreboard and Bobs Big Boy, Advice concluded that there had been no change in the direction of the business since the employer still sold engines and serviced them as before, using the component parts it now purchased from a subcontractor, and did not terminate a product or a service.

As in the above-described cases, the Employer here will continue to procure the manufacture of its traditional products, and market and sell them to its traditional customer base. It has not closed a separate and distinct business, but has merely subcontracted an integral part of its business. Therefore, it has not changed the nature or direction of its business so as to remove the decision to subcontract from the bargaining obligation.

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[24] Summit Tooling Co., 195 NLRB 479 (1972), enfd. 474 F.2d 1352 (7th Cir. 1973), where the employer stopped manufacturing and selling tools and became exclusively a tool design company, is also distinguishable in that the employer decided to completely close a severable aspect of its business.

[25] 286 NLRB 21 (1987).

The cases where subcontracting decisions have been held non-bargainable because they involved major changes in the enterprise are distinguishable from the instant case. In Adams Dairy,[26] for example, the employer terminated the distribution part of its dairy business, contracted with independent distributors to deliver milk to retailers, and terminated its driver-salesmen. The Eighth Circuit, reversing the Board, held that a "basic operational change" had taken place in that the dairy "liquidated that part of its business handling distribution of milk products."[27] However, in Adam's Dairy the employer did not subcontract a part of its operation on which it relied in conducting the rest of its operation. Adam's Dairy had nothing whatever to do with its product once the milk was sold to the Independent Distributors, who took title to it and sold it to whomever, and however, they chose. Thus, the decision to stop distributing was akin to a decision not to be in part of the business, rather than to subcontracting an integral part of the business. In the instant case, the subcontractors manufacture cards and gum for the Employer, and the Employer sells the products as its products to its customers. As in Fibreboard, the Employer merely is using different employees, employed by a subcontractor, to perform the work that must be performed in order for the Employer to conduct its business.

In Garwood-Detroit Truck Equipment,[28] the employer, which had sold parts for trucks and installed them on the trucks, contracted with independent contractors to do the installation and service work at the employer's facility. The Board held that that was not a mandatory subject of bargaining in part because the employer's "abandonment" of one aspect of its business, even though that aspect was continued by independent contractors, was a significant change in the nature of the business. However, the subcontracting arrangement in Garwood-Detroit -- whereby the independent contractors paid rent to the employer, to use its facilities and equipment, in return for the exclusive right to work directly for the customers in installing the

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[26] 350 F.2d 108, 111 (8th Cir. 1965), denying enf. to 137 NLRB 815 (1962).

[27] The Board later said in Otis, 269 NLRB at 893, that it agreed with the 8th circuit's rationale in Adam's Dairy and would find that kind of employer decision to be a nonmandatory subject of bargaining if presented with similar facts again.

[28] 274 NLRB 113 (1985).

employer's parts -- was more akin to an employer's "going out of a part of its business" than where an employer contracts with subcontractors to manufacture items the employer has designed and will sell to its customers. Moreover, the decision in Garwood-Detroit was based largely upon the Otis dichotomy: the employer's decision was considered to be a change in the direction of the enterprise because it did not turn on labor costs (although labor costs were a factor), but on massive overall overhead costs. To the extent that the Otis dichotomy is still valid, the decision in the instant case did turn on labor costs. If the dichotomy is no longer valid, the heavy reliance in Garwood-Detroit on that dichotomy undercuts its relevance in determining whether the employer's decision to "abandon its service and mounting operations" was the kind of change in the nature of the business that would defeat the General Counsel's prima facie case under Dubuque.

Finally, in Kroger Company,[29] the employer closed its "nest-run" egg processing facility (which utilized eggs obtained from farmers), and began obtaining finished eggs for its grocery stores from an "integrated" egg processor (which used its own hens at the processing facility), because the supply of unfinished eggs not being used by integrated processors had decreased and become inordinately expensive. The Board held that the decision to close was not a mandatory subject of bargaining in part because the decision represented a change in the nature of the employer's business in that the employer no longer operated any egg processing facility.[30] However, in Kroger, the employer did not merely subcontract the work previously performed by the employer's employees, but began purchasing eggs, from a company that was producing them in a substantially different manner, in order to terminate an outmoded operation.[31] Thus, the decision was similar to an

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[29] 273 NLRB 462 (1984).

[30] The Board also relied heavily on the Otis dichotomy; i.e., it found that the employer's decision constituted a change in the nature of the enterprise because it did not turn on labor costs. As discussed, above, with reference to the Garwood-Detroit case, the instant case is distinguishable because the Employer's decision turned on labor costs.

[31] See also Bostrom Division, UOP, Inc., 272 NLRB 999 (1984) (employer's decision to consolidate operations and subcontract work was non-mandatory because it turned on the employer's inability to compete because of an "outmoded" operation); Fraser Shipyard, 272 NLRB 496 (1984) (employer's

employer's decision to introduce a different method of production or operation into its own enterprise, which would be an entrepreneurial decision outside the bargaining obligation.[32] In the instant case, the Employer merely has subcontracted with other companies to manufacture its products in substantially the same manner as the Employer had manufactured them.

The Employer undoubtedly will assert that its closing of the Duryea facility and selling of all the equipment, which involved a substantial capital restructuring, demonstrates it has made an entrepreneurial decision which should not be subject to bargaining. In Bob's Big Boy, the Board acknowledged, consistent with Fibreboard, that the substantiality of the capital transactions involved was a factor to consider in determining whether a subcontracting decision was a mandatory subject of bargaining. The Board found there that the capital transactions involved in shutting down the employer's shrimp processing capabilities were not substantial enough to remove the decision from the bargaining obligation, since there were no immediate capital changes, the employer retained possession of some equipment it used elsewhere in its facility, and there were no major changes in the facility. In contrast to Bob's Big Boy, the instant case involves closure, and probable sale, of an entire facility and has already involved the sale of equipment to a subcontractor.

However, the Region should argue that the degree of capital investment or withdrawal has never been a determinative rationale for finding this kind of decision to

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decision to close its machine shop and subcontract all of the work to another subsidiary was non-mandatory because it was motivated by declining business and the substantial capital necessary to modernize the machine shop). Compare Pertec Computer, 284 NLRB 810 (1987), enfd. 926 F.2d 181 (2d Cir. 1991) (employer closed a facility that manufactured typewriter ribbons and cartridges, relocated some of the work, and subcontracted the rest to a Mexican manufacturer; that was not a fundamental change in the nature of the business because the employer did not change the products, manufacturing process, or technology of production, but merely was having essentially the same work done by other employees in other locations).

[32] See Noblitt Bros., 305 NLRB at 330; Holly Farms, 311 NLRB at 278.

be mandatory or nonmandatory.[33] The Dubuque test was enunciated specifically to deal with relocations that, by their very nature (involving closures of facilities and other major changes) encompass substantial capital transactions. It is those transactions that distinguish relocations and other employer decisions from simple Fibreboard subcontracting, which is termed mandatory without analysis under the multi-part test established in Dubuque.[34] The fact that the Employer's decision involved substantial capital transactions makes this a case appropriately analyzed under Dubuque, rather than Fibreboard, but does not, independent of other rationales, require a finding that the Employer has changed the nature or direction of its business.

B. Dubuque affirmative defenses

Having concluded that the General Counsel can establish a prima facie case under Dubuque, we further conclude that the Employer likely will not be able to establish either of the Dubuque affirmative defenses. With regard to whether labor costs were a factor in the decision, the Employer has acknowledged that $5 million of the $9 million it anticipated saving through subcontracting were savings in labor costs.[35]

A more difficult question is presented as to whether the Employer can prove the second affirmative defense that the Union could not have offered concessions sufficient to change the Employer's decision. In this regard, the appropriate inquiry is whether the Union could have offered concessions sufficient to meet the full $9 million the Employer anticipated it would save through outsourcing, even though only $5 million of that amount derived from savings in labor costs. There is some evidence that the Union would not have made concessions of anywhere near that amount: (1) the Union indicated that its initial offer of $2.4 million in concessions (plus any savings to be obtained by

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[33] See Reece Corp., 294 NLRB 448 (1989) (closure of facility and relocation of work to other facilities mandatory, under Otis, despite significant capital transactions involved).

[34] See Holmes & Narver, 309 NLRB 146 (1992) (Dubuque test applies to relocations, which involve complicated capital decisions, and not to simple subcontracting).

[35] See Reece Corp., 294 NLRB at 450 (employer admitted relevance of labor costs in seeking concessions from the union).

addressing the employer's concerns about work breaks) was "close to its bottom line"; (2) the Union's business agent sent a letter to the Employer objecting to the Employer's request for $9 million in concessions when not all of that was related to labor costs;[36] (3) the Union was quoted in newspaper articles as stating that it would not address the amount of the Employer's outsourcing savings not attributable to labor costs, and that "there is no way we could come up with $9 million in concessions"; and (4) giving up $9 million in concessions might require the employees to work at minimum wage, and surrender many if not all benefits.

However, the Region should argue that: (1) since the Union's proposal of $2.4 million in concessions was a serious initial proposal, but not the Union's final proposal, it does not prove that the Union would have been unable to change the Employer's decision had bargaining proceeded; (2) the referenced letter from the Union's business agent objected to the Employer's request for concessions not related to labor costs, but nowhere stated that the Union would not negotiate regarding the full $9 million the Employer hoped to save; (3) newspaper articles often reflect the parties' posturing and are inherently unreliable in determining what concessions the Union may have been able to offer in bargaining if necessary; (4) giving up $9 million in concessions would not require the employees to "work for free,"[37] and, faced with loss of their livelihoods, employees may have been willing to work for minimum wage;[38] and (5) the Board has imposed a heavy

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[36] The Employer also now claims that there were several conversations between Monahan and Drewniak during which Monahan made statements such as "there is no way the Union could come up with $9 million." However, the Employer did not allege any such conversations to the Region during its investigation, there is no documentary evidence corroborating them, and the Union has not had an opportunity to respond to this assertion. [Exemption 5

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[37] See Dubuque, 303 NLRB at 392, n. 13.

[38] The Union asserts, moreover, that it could provide $9 million in concessions without reducing wages to minimum wage and with far fewer cuts in benefits than the Employer has asserted would be necessary. To the extent the Union can substantiate these assertions, the General Counsel's case is stronger.

burden on employers with regard to this defense,[39] and has been unwilling to hypothesize that a union "would not" agree to concessions it was capable of making.[40]

Since the Employer relies so heavily upon the October 14 letter from Monahan as evidence of the Union's inability to meet the Employer's anticipated savings through outsourcing, that letter is worthy of more detailed examination. The Employer specifically relies upon the Union's statements therein that the Employer had placed employees in an "impossible predicament . . . that you knew then and know now would mean the end of their jobs," that the Employer was unfairly insisting on $9 million in Union concessions when much of the savings from outsourcing were non-labor cost savings, and that "by taking this position, the Company has ensured that its decision to close the Duryea Plant will be accomplished, one way or another." However, those statements, especially in context, could be interpretted to mean no more than that the Union believed (1) that it was unfair for the Employer to seek such large concessions when it had been making a profit, and (2) that bargaining would be futile not because the Union could not offer $9 million in concessions but because the Employer's decision had already been made. Furthermore, since there is hard evidence that the Union in fact could have offered $9 million in concessions, without requiring employees to work below minimum wage, any statements by the Union regarding its inability to do so must be viewed simply as efforts to persuade the Employer to accept smaller concessions. If the Employer's argument is that this letter demonstrated the Union would not have offered concessions of $9 million even if it was capable of doing so, that is insufficient as a matter of law to meet the Employer's burden under the Dubuque affirmative defenses. Bargaining should have

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[39] See Owens-Brockway Plastic Products, 311 NLRB 519, 522-525 (1993); Holmes & Narver, 309 NLRB at 147 (even if the employer was already providing wages and benefits at the lowest possible level under the law, the parties could have bargained about many other alternatives to downsizing, including modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, reassignment of work and job reclassifications). See also Textron Lycoming, supra (Advice rejected employer's unsupported assertion that bargaining would be futile because the union could not come up with sufficient concessions to outweigh economic benefits of change).

[40] See Pertec Computer, 284 NLRB at 810-811, n. 3.

proceeded and, "once bargaining to impasse [had] occurred, the futility of continuing [would be] clear."[41]

[41] Id., at 810-811, n. 3.

II. The Employer Did Not Bargain to Impasse Before Implementing Its Decision

Where a Category III decision is a mandatory subject of bargaining, "the employer's obligation will be the usual one of negotiating to agreement or a bona fide impasse."[42] The existence of impasse is a factual determination that depends upon a variety of factors, including the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.[43] The burden of proof is on the party asserting impasse.[44]

Here, the parties met only 2 times to discuss the closure and subcontracting, and there were no meetings after the Union presented its initial proposal.[45] The issues were of great importance, involving the proposed loss of over 400 employees' jobs. There was no contemporaneous understanding of impasse; indeed, the Employer did not even assert that the parties were at impasse, but merely that they were far apart, when it announced that it had decided to close the facility.[46]

Concededly, the Employer complied fully with its obligation to provide the Union with information regarding the proposed closure and subcontracting. Furthermore, it

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[42] See Dubuque Packing, 303 NLRB at 391. The only exception is where there are economic exigencies which the Board may take into account in determining whether an impasse has been reached. There is no evidence here that the Employer needed to implement its decision expeditiously. Furthermore, the option agreement the Employer had entered into with Leaf specifically provided that the Employer had until April 1997 to exercise its option to enter into the subcontract.

[43] Taft Broadcasting Co., 163 NLRB 475, 478 (1967).

[44] Outboard Marine Corp., 307 NLRB 1333, 1363 (1992), enfd. 9 F.3d 113 (7th Cir. 1993).

[45] See Arrow Automotive, 284 NLRB 487 (1987), enf. denied on other grounds 853 F.2d 223 (4th Cir. 1988) (one session of bargaining not sufficient to reach impasse regarding closure decision, where union had made concessions).

[46] See Dorsey Trailers, Case 4-CA-24120, Advice Memorandum dated August 8, 1996.

clearly would have been difficult, although not impossible, for the Union to address the Employer's lawful desire to save $9 million. Moreover, at the October 29 meeting, the Union's negotiator stated that the Union had eliminated "posturing" and that the initial proposal was "close" to a final offer. The Employer's negotiator stated at the end of the meeting that if there is anything else you would like me to present to [the decisionmakers], now is the time to do it. The Union had no further response other than to hand the Employer's negotiators a memorandum regarding the Employer's loss of approximately $3.5 million per year due to extended work breaks. When the Employer's counsel later told the Union, after the decision had been announced and during effects bargaining, that it would consider another proposal from the Union regarding the closing decision, the Union did not respond.

However, the Union's representative specifically stated at the October 29 meeting that the Union's initial offer was not its final offer, and that the Union very much wanted to save the plant. The Employer itself acknowledged that the Union's initial proposal reflected substantial concessions. Thus, the Union's statement that its initial offer was "close" to its bottom line was insufficient to permit the Employer's declaration of impasse.[47] Moreover, the Union never precluded concessions that might equal or approach the $9 million the Employer hoped to save by outsourcing.[48] The Union was not required to present its final proposal at the first session, but was entitled to an employer counterproposal or response before making further concessions. The Union was privileged to decline the Employer's offer, after the decision had been made, to consider another Union proposal.

It appears from discussions the Division of Advice has had with the Employer's counsel that the Employer knew at

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[47] See Stephenson Yost Steel, 294 NLRB 395, 396 (1989), enfd. 904 F.2d 1180 (7th Cir. 1990) (employer prematurely presented its "final offer" after two bargaining sessions, where the union had been making concessions; Board rejected employer's argument that the union had hit its "bottom line," where the union had not identified its offer as its "final offer"). Compare Columbia Records, 207 NLRB 993 (1973) (union stated that proposal was its "bottom line" and that, if employer did not accept it, union was prepared to face the consequences of a shutdown).

[48] When asked whether the Union could come up with an additional $7 million in savings, the Union's counsel replied "not today."

the outset of negotiations that it was going to insist on $9 million in concessions, assumed that the Union would not be able to offer that much in concessions (based in large part upon its view of the "economic realities" that the Union could never negotiate such a concessionary contract), and so "cut to the chase" and made the decision to close before bargaining had run its full course. Whether or not the Employer was entitled by law to enter into negotiations with a fixed intention not to accept anything other than $9 million in concessions, it cannot rely upon that inflexibility to demonstrate that the parties were immediately at impasse. Nor was it entitled to assume the Union would not make such concessions, if push came to shove, based solely on the alleged "economic realities" and on the Union's statements of anger and frustration at being asked to make such concessions. Since the purpose of the Act is to foster collective bargaining, which Congress determined is a meaningful exercise, "to conclude in advance of bargaining that no agreement is possible is the antithesis of the Act's objective of channeling differences, however profound, into a process that promises at least the hope of mutual agreement."[49]

Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, consistent with the foregoing analysis.

B.J.K.

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[49] Pertec Computer, 284 NLRB at 811, n. 3.